

## **ADMINISTRATIVE APPEAL DECISION**

**NEC TRANSIT/WILLIAM, LLC; FILE NO. 2000-00325(2)**

**BUFFALO DISTRICT**

**AUGUST 30, 2001**

**Review Officer:** Rodney L. Woods, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

**Appellant Representative:** Mr. Thomas Butler, URS Corporation, Buffalo, New York

**Permit Authority:** Section 404 of the Clean Water Act.

**Receipt of Request For Appeal (RFA):** June 1, 2001

**Appeal Conference/Site Visit:** July 5, 2001

**Background Information:** The appellant wishes to construct a retail center, known as "The Gateway Centre," on a 36-acre parcel located at the northeast corner of Transit Road and William Street in Lancaster, New York. A wetland delineation, performed by the applicant's consulting firm, Earth Dimensions Inc., was originally performed August 1994 but was not submitted to the Buffalo District (District) for affirmation. The wetland boundaries were re-delineated in February 2000 by Mr. Tom Butler while he worked for Nussbaumer & Clarke, Inc. The District verified the second delineation, with modifications, on June 1, 2000. The verification indicated that the site contains 7.54 acres of wetland.

The District received an application for the project on September 13, 2000 and published a public notice regarding the project on December 29, 2000. Following a U.S. Supreme Court decision in January 2001, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, (121 S. Ct. 675 (2001)) hereafter referred to as the "SWANCC" decision, Mr. Butler, now with the URS Corporation, the appellant's consultant, requested a new jurisdictional determination to address whether the wetlands could be considered "isolated". In a letter dated April 3, 2001, the District determined that the wetlands on the parcel are historically part of a tributary system to Lake Erie, and therefore, were not isolated.

On June 1, 2001, the appellant filed an appeal of this determination to the Commander of the Great Lakes and Ohio River Division. In a June 18, 2001 letter to the appellant, signed by Brigadier General Robert H. Griffin, I was delegated the authority to serve as both the Review Officer and decision authority regarding this RFA. This delegated authority is in accordance with the regulations at 33 CFR 331.3(a)(1).

Summary of July 5, 2001 Site Visit:

The site visit was attended by Mr. William Szawranskyj from NEC William-Transit LLC, Mr. Joe Cipolla from Bella Vista Group, Mr. Thomas Butler, Mr. Tom Connare, and Ms. Shruti Joshi from URS Corporation, Mr. Scott Livingstone from Earth Dimensions, Inc., Ms. Bridget Brown, Mr. Harold Keppner, and Mr. Dave Leput from Buffalo District and Ms. Suzanne Chubb and Mr. Rodney Woods from the Great Lakes and Ohio River Division.

As labeled by the appellant's consultants, the wetland areas are listed as "A", "B", "C", "D", "E" and "F". Wetland areas B, C and E are interconnected and located in the central portion of the site. Wetland area A lies south of Wetland B and, as indicated by Nussbaumer & Clarke, Inc. on their March 5, 2000 wetland delineation map, is connected to B by a "drainage swale". Wetland F lies in the southeast corner of the parcel below Wetland A. Wetland D lies along the northern boundary of the site, north of Wetland C. The District's record indicates that Wetland A drains north into the B-C-E central wetland complex while this complex and wetland D drain west to Transit Road. The District noted that prior to the late 1990's, the wetland discharges entered culverts under Transit Road and continued westward through hydric soils to a tributary of Slate Bottom Creek. Slate Bottom Creek is a tributary to Cayuga Creek and Lake Erie. In the late 1990's the District authorized the New York State Department of Transportation to redirect the wetland discharge at Transit Road northward, via 6500 feet of storm sewer, into Cayuga Creek. This interrupted the westward flow through intermediary tributaries, but ultimately discharged to the same water body, Cayuga Creek.

The site was completely traversed and reviewed. Numerous soil samples were studied in the field, vegetation was identified, and drainage and hydrology observations were made in conjunction with the wetland delineation flagging that remained on site. All samples and points of review were discussed thoroughly among the attendees. During the site visit and review of the RFA, Wetland areas B, C, and E were observed and reviewed. Although their jurisdictional status was not questioned in the RFA, the District record clearly shows they are historic tributaries. The March 28, 2001 memorandum thoroughly discusses the tributary connections.

**Basis for Appeal as Presented by the Appellant:**

**Reason 1:** Wetland areas A, D and F are isolated and are not adjacent.

**Finding:** The reason for appeal has no merit. Wetland A is a tributary wetland to other wetlands onsite, including wetland B. While the hydrologic connection area between Wetland A and B does not exhibit a discernable channel or wetland, District staff observed flowing water during the site visit on April 26, 2000. Wetland A is located up-gradient such that water flows into Wetland B, and into Cayuga Creek by the storm sewer and then into Lake Erie. Therefore, Wetland A is within Corps jurisdiction.

Wetland F has no discernable outlet and there is no evidence that water ever flows from the wetland. However, Wetland F is located only a few feet southeast from Wetland A and is clearly a part of the same ecosystem. The district and the appellant's consultant indicated the area was similar in soils and vegetation to the other wetlands and that historically Wetland F was part of the same wetland complex. These factors indicate that it is adjacent to Wetland A and also under Corps jurisdiction.

Wetland D is not isolated but is part of an area of contiguous wetlands that are part of the existing and historical tributary system. The district's mapping and aerial photography review and observations noted during the site visit showed that Wetland D is not recently created but is many years old and is part of the watershed tributary drainage.

**Action:** No further action.

**Discussion:** Wetlands are defined in the Corps regulations as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" (33 C.F.R. 328.3(b)). The Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) noted that the Corps does not require periodic inundation, only that the soils are sufficient to support wetland vegetation. The Court also addressed the question of whether it is reasonable, in light of the language, policies, and legislative history of the [Clean Water] Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as "waters" (*Id.* at 131). The Court gave significant deference to Corps' technical expertise when it stated that "...the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act" (*Id.* at 134). Further, the Court determined that this deference "holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water" (*Id.* at 134). Therefore, the Court found to be reasonable the Corps' premise that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic ecosystem, even when the water that created the wetlands does not have its source in adjacent water bodies.

In the recent SWANCC decision, the Supreme Court held that the Corps exceeded its statutory authority by asserting Clean Water Act jurisdiction over an abandoned sand and gravel pit in northern Illinois, which provides habitat for migratory birds. In SWANCC, the Court's holding was narrowly limited to the conclusion that the Migratory Bird rule (51 Fed. Reg. 41217 (1986)) as implemented by the Corps under 33 C.F.R. 328.3(a)(3) is not supported by the Clean Water Act (CWA), thus the holding is strictly limited to waters that are non-navigable, isolated, and intrastate. Any waters outside of that category may still be regulated under the CWA to the full extent of the Corps' authority under the statute and regulations and consistent with case law. Important for this particular administrative appeal decision is that the Court did not overrule the holding or rationale of *United States v. Riverside Bayview Homes, Inc.* Traditionally navigable

waters, interstate waters, their tributaries, and adjacent wetlands are still considered "waters of the United States."

The appellant asserts that wetland areas A, D and F are isolated and do not meet the adjacency criterion established above claiming that "there is not a significant hydrological connection ("significant nexus") between these areas and historical drainage's traversing the Site that ultimately discharge to tributaries of a navigable water". The RFA describes the physical separation of wetlands A and F and the lack of an outlet channel from Wetland A. Also noted in the RFA is the observation made by the appellant's consultants that water does overflow from Wetland A. The non-hydric soils separating the wetlands were also discussed. The appellant claims that Wetland D is recently created by outflow from a storm retention pond located to the east and is not part of the historic drainage.

The District observed that Wetland F had no discernable outlet for water flow and no evidence that water ever flows from the wetland. However, Wetland F is in close proximity to Wetland A and the other wetlands, and contains similar vegetation and soils. Wetland F is determined to be in the same ecosystem and adjacent to other wetland areas.

The non-hydric soil area between Wetland A and B was disturbed before the July 5, 2001 site visit. The brush and trees had been cut and removed by large equipment. The earth and soils were partially disturbed, tracked, and scuffed by the activity. However, coupled with past site visit reports and maps, there was enough of the area remaining undisturbed to determine the soils were not hydric. Wetland A has a location where water flowed from the lowest point in its rim but had no discernable channel or wetland soils in the area where water overflows. Water overflows rarely or with such low velocities that it leaves no evidence of flow through erosive forces. The length of time the flow occurs is so short that no saturated soils are created. However, since the Corps representatives and others observed water flowing at that location, the district determined that Wetland A is not isolated but a tributary to the wetland complex. Also Wetland A is a closely related part of the same ecosystem complex. The character and relationship of Wetlands A and F with the other wetland areas is strongly influenced by the geomorphology and climate of the area. The area is relatively flat with a land type that contains similar wetlands, some functioning continuously as feeder streams and some nearly isolated so that they flow only in heavy rainfall events where water accumulates and overflows to lower areas. From an ecological standpoint, there is no separation of any of the wetland areas on the project site. As noted above, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands is a sufficient basis for making a jurisdictional determination regarding adjacency.

The appellant's assert that Wetland D is recent creation caused by the catch basin constructed in an adjoining subdivision. The District observed in an April 26, 2000 site inspection that the catch basin does drain into Wetland D. However, Wetland D is not a recent occurrence as evidenced by the hydric soils it possesses requires tens to hundreds of years to form. Aerial photographs in the administrative record indicate that the

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catchment basin was constructed between 1985 and 1995. The File Memorandum, dated March 28, 2001, discussed the historical drainage of Wetland D that is now routed into a storm-drain that provides a shorter path to Cayuga Creek and Lake Erie.

**Conclusion:** For the reasons stated above, I conclude that this Request For Appeal has no merit. Significant ecological and hydrological connections between Wetlands A, D, and F and the historical drainage exist, and therefore, meet Corps jurisdiction requirements.

FOR THE COMMANDER:

A handwritten signature in black ink, appearing to read 'R. Woods'.

RODNEY L. WOODS  
Appeal Review Officer  
Great Lakes & Ohio River Division